United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7227

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE MUSLIM COMMERCIAL BANK LIMITED,

Plaintiff-Appellee,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,

Defendants.

PUBALI BANK, RUPALI BANK, SONALI BANK and ADAMJEE JUTE MILLS, LTD.,

Plaintiffs-Appellants,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,

Defendants.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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BRIEF FOR APPELLEE

This brief is submitted on behalf of The Muslim Commercial Bank Limited ("Muslim Bank") on appeal taken by Pubali Bank, Rupali Bank, Sonali Bank and Adamjee Jute Mills, Ltd. (the "Bangladeshi Claimants") from summary judgment entered in the District Court for the Southern District of New York for Muslim Bank and against the Bangladeshi Claimants. The decision of Judge Lawrence

W. Pierce granting summary judgment appears in the Joint Appendix at pages 223-26.*

Preliminary Statement

After World War II. two new states were formed out of what had been British India. One was Pakistan. comprised of two non-contiguous geographical areas--West Pakistan and East Pakistan--which were separated by the other new state. India. East Pakistan was largely an agricultural area in which large quantities of jute. one of Pakistan's principal exports. were grown.

In the Spring of 1971. Bengali rebel activity began in East Pakistan. In early December 1971. full-scale civil war broke out. and on December 16. 1971. Bengali rebels supported by regular troops of the Indian Army secured independence from Pakistan and proclaimed the territory of East Pakistan to be the new nation of Bangladesh.

The Bangladesh government proceeded in the following several months to nationalize the businesses. including the banks. and property of Pakistani nationals.

As a result of the nationalizations. United States' importers of goods shipped from East Pakistan shortly before

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* References to the Joint Appendix are hereinafter preceded by the letters "JA".

the civil war were faced with conflicting claims to payment from Pakistani banks, which financed the exports, and from Bangladeshi banks and jute mills (in essence the state of Bangladesh), which purported to have nationalized the exports. The claims of the Bangladeshi depended upon enforceability of the nationalization decrees in the courts of the United States.

Four sets of actions were brought in our courts in 1972 and 1973 to resolve these conflicting claims. In each the Bangladeshi claimants relied principally on the act of state doctrine because the nationalization decrees failed to offer any compensation for the takings and were thereby clearly inconsistent with the law and the policy of the United States. In Rupali Bank v. Provident National Bank, Civ. No. 72-1653 (U.S.D.C., E.D. Pa. filed September 22, 1975) (Exhibit A annexed hereto), and in United Bank Limited v. Cosmic Int'l, Inc., 542 F.2d 868 (2d Cir. 1976),* the act of state and other arguments made by the Bangladeshi Claimants were broadly rejected, and the Pakistani banks were awarded the proceeds of jute shipments which had left East Pakistan prior to December 16, 1971 and purported nationalization.

The instant case is the fourth of the series. It presents the same issues as did Rupali and United Bank.

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* The United Bank case is actually two sets of cases which were consolidated for trial and on appeal.

The Bangladeshi Claimants sought. however. to have Judge Pierce distinguish the prior cases and recognize the confiscation of the proceeds payable by the U.S. importer merely because the jute involved here was resold by the U.S. importer (and shipped directly from East Pakistan) to a company in the Dominican Republic and because the bills of lading covering the shipment were within Bangladesh at the time of the confiscation. Judge Pierce properly rejected the Bangladeshi claims on the ground that taking of rights to payment for the jute (which was shipped prior to December 16. 1971 and nationalization) could not have been completed within the territory of Bangladesh and that enforcement of the claims would be contrary to the law and policy of the United States. JA 231-32. Judge Pierce's decision should be affirmed by this Court. To rule otherwise would be to expand the act of state doctrine to require recognition of a confiscation. the primary object and intended effect of which was outside the confiscating state and within the United States and which could not be completed without an act of the courts of the United States.

Statement of the Case

On May 18. 1971. M. Golodetz & Company ("Golodetz") entered into an agreement in New York to purchase jute bags (the "Jute") from Adamjee Jute Mills. Ltd. ("Adamjee Paki-

stan") for delivery to Consejo Estatal del Azucar ("CEA") in the Dominican Republic. JA 37. Golodetz, a New York partnership with its principal place of business in New York City, negotiated and executed the agreement in New York with Adamjee Pakistan's New York representative and agent, R.E.B. Willcox & Co. Under the terms of the agreement, Golodetz agreed to pay the purchase price in New York, on sight, against appropriate shipping documents. Delivery was to be f.o.b. East Pakistan. JA 37.

The Jute was loaded on board an American flag vessel in November 1971 and was in international waters not later than November 19, 1971. JA 37. The carrier issued bills of lading covering the Jute to the order of Muslim Bank, which financed Adamjee Pakistan's exports. The bills of lading directed that the arrival notice be addressed to CEA, which was also named as a consignee of the Jute. JA 39.

The bills of lading and related documents covering the Jute were delivered to a branch of Muslim Bank in East Pakistan and in the regular course would have been presented to Golodetz in New York upon arrival of the Jute at its destination. JA 14, 37. They were, however, detained in East Pakistan (presumably because of the state of civil war existing there at the time) and thus were not presented to Golodetz for payment prior to arrival

of the Jute in the Dominican Republic. Golodetz was able, nonetheless, to secure release of the Jute by obtaining from a New York City bank, and delivering to the carrier in New York, an undertaking indemnifying the carrier against claims for wrongful delivery. The Jute was released to Golodetz on December 17, and December 21, 1971, in the Dominican Republic and delivered to CEA. JA 38.

After military victory on December 16, 1971, the Bangladesh government assumed control over the operations of Pakistani banks and businesses. In February 1972, it confiscated all the property in Bangladesh of Pakistani nationals, and in March 1972, it created new banks to administer the branch offices and property in Bangladesh which had belonged to Pakistani banks. In this series of steps the government in effect nationalized the assets of Pakistani banks relating to their operations in East Pakistan prior to December 16. JA 40-41.* It is alleged that the bills of lading, the Jute and the rights and claims of various kinds to receive the proceeds or an equivalent sum were thereby taken within Bangladesh and transferred to the Bangladeshi Claimants. JA 191-92. Only the bills of lading were, however, within Bangladesh at the time of (or after) the taking. JA 39.

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* No compensation has been offered or paid with respect to this nationalization. JA 40-41.

In early 1972, Muslim Bank and the Bangladeshi Claimants both made demands in New York on Golodetz for payment of the purchase price of the Jute, and the Bangladeshi Claimants presented the bills of lading and related documents in New York for payment. JA 38-39. Because of the conflicting claims, Golodetz refused to make payment, but it did not deny liability for the purchase price. See Answers of M. Golodetz & Co. JA 2, 6. Muslim Bank commenced an action against Golodetz and the carrier on December 15, 1972. JA 2. The Bangladeshi Claimants commenced their similar action February 6, 1973. JA 6.* No action was commenced in the Dominican Republic against CEA, and CEA was not sought to be joined as a party in either of the two actions commenced within the Southern District of New York. None of the plaintiffs sought possession of or title to the Jute; on the contrary, they sought damages equivalent to the agreed purchase price thereof on various theories based upon Golodetz's failure to pay (and the carrier's failure to demand payment**) for the Jute

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* These two actions were consolidated by order entered April 4, 1973.

** This claim, as well as any which might have been asserted against CEA, appears to be barred by 47 U.S.C. § 1303(b), Carriage of Goods by Sea Act, since the action was not commenced within one year of the delivery of the Jute.

prior to taking delivery thereof. See Complaints of Muslim Bank and Bangladeshi Claimants. SA 1-23.*

Argument

The nationalization of Muslim Bank's East Pakistan branches and properties was admittedly without consideration, JA 15, and was aimed solely at Pakistanis, JA 164; thus, it was both confiscatory and discriminatory and therefore contrary to the law and policy of the United States. Accordingly, the nationalization are not entitled to recognition in our courts unless shielded by the act of state doctrine or otherwise not subject to or not inconsistent with the law and policy of the United States.

We demonstrate below that none of the grounds urged by the Bangladeshi Claimants to avoid dismissal of their claims because of their inconsistencies with the law and policy of the United States is tenable. The act of state doctrine, as uniformly interpreted and applied, does not protect the extraterritorial claims asserted here. The application of the United States law and policy is justified by its role as the forum and by its connection with the underlying transaction. And to recognize and to give effect to the taking would do violence to our public policy even though the taking occurred during a war between foreign states.

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* References preceded by "SA" are to the Supplemental Appendix.

POINT I

THE COURT PROPERLY APPLIED THE PUBLIC POLICY OF THE FORUM

The initial argument of the Bangladeshi Claimants in seeking reversal of the carefully reasoned decision below is that the public policy of the United States is not an appropriate standard for judging the confiscatory action of Bangladesh because, they allege, the United States is a "bare forum." This argument must fail for two fundamental reasons:

(a) It is based upon a misstatement of the facts of this case; and

(b) Even if the only interest of the forum and the only contact between the forum and the Jute sale transaction were the pendency of the litigation in the forum, the Court would apply--absent the act of state doctrine's preventing such application--the public policy of the United States.

A. The Bangladeshi Claimants' Argument Is Based on a Misstatement of the Facts--The Underlying Transaction Has Significant Contacts with the United States

The Balgladeshi Claimants assert that there is no important connection between the United States and the Jute sale transaction, that the dispute at bar is merely one between foreign nationals over property secured as

an incident to war and that it is therefore inappropriate to apply the law and policy of the United States to defeat the claims of the Bangladeshi Claimants. They have attempted to support this argument through misstatements of facts and omission of facts which, upon fuller and more accurate development, show that the contacts with the United States are substantial and the application of its policy is appropriate.

The Bangladeshi Claimants assert, for example, that "there is [not] present here an American buyer . . ." and that "[n]either the jute, nor the negotiable bills of lading which embody title, ever came in contact with United States territory." Appellants' Brief at 8. The true facts are quite contrary. The buyer of the Jute, Golodetz, was a New York partnership with its principal offices in New York, JA 30; the underlying contract of sale was negotiated and executed in New York, JA 37; the bills of lading were to be presented, and payment of the purchase price to be made, in New York, JA 37; the Jute was shipped in an American flag vessel, JA 37, and, as a consequence, was in United States territory during the voyage from the territorial waters of East Pakistan to the territorial waters of the Dominican Republic;* the Bangladeshi Claimants presented the

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* United States V. Rodgers, 150 U.S. 249 (1893); United States v. One 43 Foot Sailing Vessel, 405 F. Supp. 879, 881 (S.D. Fla. 1975); Restatement of Foreign Relations § 28 (1965).

bills of lading for payment in New York, JA 39; and, when the Bangladeshi Claimants' presentation here was dishonored by Golodetz, they, on their own volition, instituted an action against Golodetz and the carrier (one of the consolidated actions now before this Court) seeking to recover the proceeds of the sale of the Jute which have always been within the Southern District of New York and which are now on deposit with Citibank, N.A., by agreement of the parties to this appeal. JA 38; SA 24. Accordingly, it is inaccurate and, to say the least, disingenuous for the Bangladeshi Claimants to say to this Court that there are no "important local connections" or that this is "an essentially foreign transaction."

Moreover, the Bangladeshi Claimants have, by their own stipulation agreed that "this Court shall retain jurisdiction of this cause for the determination of the rights of the respective plaintiffs in and to the proceeds of the sale of the Jute by Golodetz." SA 24. In the light of this stipulation it is ludicrous for the Bangladeshi to suggest as they now do (Appellants' Brief at 10) that this action should be dismissed and no determination of the rights of the parties made.

B. The Bangladeshi Claimants' Argument Must Fail As a Matter of Law--As a "Bare Forum" a United States Court May Reject a Claim Based upon a Foreign State's Confiscation

However, even if it were true that the sole con-

tact of the United States with this matter were the fact that the parties came here to litigate their respective rights, the Court would still properly apply the public policy of the United States, which as declared by Judge Mansfield in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 898 (S.D.N.Y. 1968), modified on other grounds, 433 F.2d 686 (2d Cir. 1970), cert. denied, 403 U.S. 905 (1971) is that: [E]xpropriation without compensation is an extraordinary and basically unfair measure . . . ." Accord, United Bank Limited, supra, 542 F.2d at 877, Republic of Iraq v. First National City Bank, 353 F.2d 47, 52 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).

The Bangladeshi Claimants concede (Appellants' Brief at 6) that, in the words of Restatement (Second) of Conflict of Laws § 90 (1971):

> "No action will be entertained on a foreign cause of action which is contrary to the strong public policy of the forum."

They then cite the Bradford case, which involves the application of the full-faith and credit clause of the Constitution, for the proposition that there is a rule, ancillary to the rule cited from the Restatement, to the effect that the forum is precluded from applying its "local public policy to determine a cause on the merits, where the forum has no important connection with the transaction."

See Bradford Elect. Light Co. v. Clapper, 286 U.S. 145, 160 (1932).

The instant case, however, if it is appropriate at all to analyze it in the light of the principles asserted by the Bangladeshi Claimants,* involves not the second ancillary principle but rather the first fundamental principle. These consolidated cases were the result of the combining of two separate actions against Golodetz and the carrier--one by Muslim Bank and the other by the Bangladeshi Claimants. This Court, in terms of the latter's analysis, is simply refusing to entertain the Bangladeshi action; it is not depriving the Bangladeshi of any defense and, insofar as they are concerned, it is not holding that the Bangladesh confiscations were or were not effective in Bang-

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* The cases and choice of law propositions which the Bangladeshi Claimants cite in the course of their discussion in Point I involve the enforcement by private litigants of private causes of action--often in a sister-state context, see, e.g., Bradford Elect. Light Co. v. Clapper, supra; Bond v. Hume, 243 U.S. 15 (1917); Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918)--not the enforcement of public acts which are penal in nature. It is generally accepted that the enforcement of such public acts is inconsistent with the public policy of the United States. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14 (1964); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). And certainly there is no case involving a foreign government's nationalization which supports the Bangladeshi Claimants' analysis or their contentions to the contrary.

ladesh. It will still be open to the Bangladeshi Claimants, after this appeal is decided against them, to bring an action against Muslim Bank in Bangladesh or some other receptive forum, based on the expropriations. There has not been and there will not be any determination on the merits with respect to the expropriation; there has only been and there will only be a decision that it has no effect in this forum.

POINT II

THE ACT OF STATE DOCTRINE MAY NOT BE INVOKED TO SUPPORT THE BANGLADESHI CLAIMS

The classic statement of the act of state doctrine was made by Chief Justice Fuller in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (Emphasis supplied.)

The act of state doctrine as applied in United States decisions has been limited to cases in which the governmental act in question was completed within the territory of the foreign sovereign. The foreign state must, for the act of state doctrine to protect its conduct from scrutiny by our courts, have fully achieved its end by the exercise of its sovereign powers within its own boundaries.

The conclusion that the doctrine is so limited is illustrated by a series of cases which begins with Republic of Iraq v. First National City Bank, supra. In that case the Republic of Iraq attempted to expropriate the American bank account ex-King Faisal. In rejecting Iraq's claims, Judge Friendly stated:

> "In this case, neither the bank account nor the [securities there on deposit] . . . can realistically be considered as being within Iraq simply because King Faisal resided in and was physically present there at the time of his death. . . . [O]nly a court in the United States could compel the bank to pay the balance in the account or to deliver the certificates it held in custody. The property here at issue thus was within the United States."

353 F.2d at 51.

In Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), this Court held that nationalization of contractual claims for payment for goods sold and shipped prior to confiscation could not be completed within a state which did not have the power to collect a judgment from the contract debtor. The same conclusion was reached on similar facts in Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), in which the Court formulated the "fait accompli test" holding that a confiscation does not take place in the confiscating state unless that state is

physically in a position to perform a "fait accompli". 392 F.2d 715.

In United Bank Limited v. Cosmic Int'l. Inc., supra, this Court applied the same principle to deny enforcement of the Bangladesh decrees which are at issue here with respect to Jute shipments made to U.S. importers prior to December 16, 1971. In deciding for the Pakistani claimants, the Court not only accepted the reasoning of Tabacalera but also confirmed the Menendez rule that the situs of a debt is at the debtor's domicile since without control over the debtor the expropriating state is not in a position to perform a fait accompli over the debt. 542 F.2d at 874.

The foregoing cases are controlling and dispositive under the present facts. The Bangladeshi Claimants have, however, seized on two factual distinctions which they term crucial (Appellants' Brief at 11) in a sophistical effort to distinguish the United Bank case from the present case: "that the bills of lading were issued in what is now Bangladesh and were physically present in Bangladesh territory at the time of their nationalization." Appellants' Brief at 11. From these two facts, the Bangladeshi Claimants contend that transfer of the title to the Jute was effected within the territory of

Bangladesh. Therefore, they ask this court to conclude that the confiscation was completed there and that the act of state doctrine applies.

The Bangladeshi Claimants seek to achieve this bizarre result by ignoring the fait accompli test and by misapplying concepts developed in the law merchant and by viewing this case as an ordinary private commercial transaction rather than an extraordinary public act of confiscation. In essence, they argue that (a) under Bangladesh law a bill of lading embodies title to the chattels it describes and (b) if a government confiscates a bill of lading within its territory it has effectively confiscated the chattels described therein and is entitled to the proceeds of the sale thereof notwithstanding the fact that the chattels and the proceeds are, at all relevant times, outside its territory and can be obtained by it only through resort to the courts of another State.

The decisive question here, however, is whether Bangladesh was "physically in a position to perform a fait accompli", Tabacalero Severiano Jorge S.A. v. Standard Cigar Co., supra, 392 F.2d 715, over the chattels (the Jute) or over the proceeds thereof or over the other obligations it alleges were seized. The answer is clearly no--the Jute was in the hands of CEA, the ultimate purchaser, in the Dominican Republic long before the purported

confiscation, and Golodetz, which refused to pay the proceeds from the sale of the Jute to the Bangladeshi Claimants upon presentation of the bills of lading, could not be compelled to pay for the Jute within Bangladesh. There is no case applying the act of state doctrine which has relied upon the control of documents of title--rather than the physical control of the underlying goods or the contract debtor--to place the state in a position so to complete a taking. The act of Bangladesh in attempting to obtain the funds at dispute here was simply not one which could "come to complete fruition within the dominion of the . . . government." Tabacalera, supra, 397 F.2d 715-16.

This Court has been faced with similar questions in cases involving the nationalization of corporate entities and has there held that such seizures do not automatically transfer rights and interests of the corporation localized in foreign states. See, e.g., Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra, 293 F. Supp. at 898-99. Accord, Maltina v. Cawy Bottling Co., 462 F.2d 1021, 1027 (5th Cir. 1972), cert. denied, 409 U.S. 1060 (1972). In Zwack, this court stated:

> "We think that, where firm assets existing in the forum are concerned, technical considerations as to the manner in which the foreign state seeks to expropriate them are not controlling. Prior to confiscation, the

> assets of the firm both here and in Hungary were equitably owned by the plaintiffs as the sole partners in the firm. It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation."

237 F.2d at 259 (citation omitted). The same principle applies here to defeat the Bangladeshi claim, for, as the United Bank Limited case makes clear, Bangladesh could not have secured the proceeds of the Jute sale directly. 542 F.2d at 874. Whatever formal significance possession of bills of lading may have under the law of Pakistan, it lacks any practical significance for purposes of the act of state doctrine. Cf. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra, 293 F. Supp. at 898.

The practical insignificance of possession of the bills of lading is as apparent in the present case as was corporate ownership in the cases cited above. Long before Bangladesh enacted its confiscatory legislation, the Jute had been delivered in the Dominican Republic to CEA, which was named on the bills of lading as the consignee.* Once the Jute was outside Bangladesh's terri-

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* This fact and others surrounding the underlying export transaction raise significant questions of commercial law (which need not be resolved for purposes of his appeal) as to whether, as a matter of law or fact, the bills of lading actually embodied title to the Jute.

tory and certainly once delivery to CEA had occurred, the possessor or holder of the original bills of lading lacked, as a practical matter, any power (derived from possession of the bills of lading) to control the disposition of the Jute and was relegated to whatever rights it might have had against Golodetz, the carrier or CEA. These rights could not have been pursued by the Bangladeshi Claimants except in foreign jurisdictions since neither the Jute nor the potential defendants were within Bangladesh.

The mere fact that the location of the bills of lading may have given Bangladesh a jurisdictional predicate for affecting title to the Jute, see Restatement (Second) of Conflict of Laws § 62 (1971), cited in Appellants' Brief at 12; Republic of Iraq v. First National City Bank, supra, 353 F.2d at 51 ("nationality . . . provided a jurisdictional basis . . . to prescribe a rule relating to . . . property outside [the confiscating state] . . . not a basis for insisting on the absolute respect which, subject to the qualifications of Sabbatino, 376 U.S. at 428, . . . the decree . . . would enjoy as to property within [the confiscating state] at that time."), is not determinative for the purposes of deciding whether Bangladesh's taking was completed within its territory. Clearly the taking was not and could not have been so completed since title to (or jurisdiction

over) the bills of lading did not give Bangladesh exclusive control or jurisdiction over the Jute, and did not relieve it from seeking the aid of foreign courts in its efforts to reduce the Jute to possession. See Republic of Iraq, supra; United Bank Limited, supra, 542 U.S. at 874; Restatement of Foreign Relations §§ 41 (Comments i & j thereto) & 43 (1965); cf. Banco Nacional de Cuba v. Sabbatino, supra; Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

The result urged by Muslim Bank here, the application of the fait accompli test to defeat the Bangladeshi's claims, is fully consistent with the Supreme Court's decision in Sabbatino, supra, and would not as Appellants allege (Appellants' Brief at 16 and 18) be inconsistent with or overrule Sabbatino. In Sabbatino, the Cuban government physically prevented the sugar it had nationalized from leaving port until the American purchaser agreed to pay the purchase price of the sugar to the Cuban successor by nationalization. That agreement was enforced by the Supreme Court. In the present case, of course, the Bangladesh government was not in a position to exert physical control over the Jute, nor was it in a position to obtain agreement from Golodetz, CEA or any other person for

payment for the Jute directly to it or its Bangladesh designee. Its only option--which it in fact pursued--was to bring suit in the United States and thus to seek the aid of our courts in completing its confiscation.

The Bangladeshi Claimants attempt to rely on principles of commercial law and practice to buttress their arguments concerning the significance of the presence within Bangladesh of the bills of lading. However relevant such principles might be if this were a simple commercial transaction, they do not insulate Bangladesh's taking from our public policy through application of the act of state doctrine. In fact, the very authorities cited by the Bangladeshi Claimants indicate the inapplicability of such principles to the question at bar. Cf. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra, 293 F. Supp. at 898 ("expropriation . . . frequently result[s] in unusual consequences not provided for in the laws of the country where the owner was established, which often assume continuation of governmental institutions according to an existing pattern rather than substitution of drastic new concepts.")

The usual significance given a bill of lading is a function of the policy to promote the "utmost freedom of commercial transactions." McCarthy, Jurisdiction Over Chattels, The Title to Which is Embodied in a Document,

31 N.D.L. Rev. 160, 162 (1955), quoted in Appellants' Brief at 14. Bangladesh's confiscation was not a commercial transaction. The Bangladeshi Claimants did not take the bills of lading in reliance upon the non-existence of conflicting claims to the Jute and proceeds of sale thereof--in fact they took them in derogation of such claims. The leading English case of Lickbarrow v. Mason, (reproduced as Exhibit D to Appellants' Brief), upon which the Bangladeshi rely, clearly points out that, although in a commercial situation the transfer of a bill of lading may convey title to the chattels, conveyance depends upon the transferee's acquiring "title fairly and honestly". Exhibit D at page 64. None of the cases cited by the Bangladeshi Claimants stands for the proposition that one who acquires title to a bill of lading unfairly or dishonestly or by confiscation acquires recognizable or valid title to either the document or the underlying chattels.* Muslim

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* If it were ever relevant, Muslim Bank would demonstrate to the Court that this is not the law of England, India, Pakistan or Bangladesh. However, for purposes of the summary judgment motion and this appeal, we have assumed arguendo the proposition urged by the Bangladeshi claimants--that under Bangladesh law, the State by confiscating the bills of lading acquired title to the Jute. Even if a Bangladesh court would so hold, a court of the United States would reject this result here as contrary to our public policy.

We have also accepted arguendo solely for the purposes of the motion and this appeal the accuracy of the Bangladeshi Claimants' interpretation of the laws of Pakistan and Bangladesh with respect to bills of lading.

Bank gave value for the bills of lading; the Bangladeshi Claimants acquired their interest, if any, without value through governmental confiscation. If security of title and freedom in commercial transactions are values to be acknowledged in the application of the act of state doctrine, Sabbatino, supra, 376 U.S. at 433-34, they are best protected by a rule which gives minimum reach to foreign confiscations and which relies on the pragmatic fait accompli test of Tabacalera, rather than upon foreign law rules regarding the abstract juridical significance of documents to title in ordinary commercial transactions. See United Bank Limited, supra, 542 F.2d at 874.

If the government of Bangladesh actually confiscated "title" to the Jute by acquiring title to the bills of lading, that act was a meaningless act; such "title" did not permit it to reach outside its territory to control the Jute or to obtain the proceeds of its sale. If it could have done so, the present lawsuits would never have been commenced. Bangladesh, assuming that it confiscated "title" to the Jute, confiscated a juridical abstraction--it could only lay its hands on the Jute through the intervention of other States, and it chose to seek that critical intervention by an action brought in the courts of the United States.

Having asked this Court to bring its acts of

nationalization to fruition, Bangladesh cannot escape our long-standing and strong public policy against confiscations.

POINT III

THE BANGLADESH EXPROPRIATION DOES VIOLENCE TO U.S. PUBLIC POLICY

In United Bank Limited, supra, 542 F.2d at 877, this Court held that neither the legislation nor the cases relied upon by the Bangladeshi Claimants:

> "suggest[ed] even remotely that confiscatory seizures of an extraterritorial nature can ever be consistent with American public policy.
>
> It would hardly be 'consistent' with American public policy to create a special exception for extraterritorial seizures committed in wartime." (Footnote omitted.) (Emphasis in original.)

There is nothing in the United Bank opinion to support the suggestion made here by the Bangladeshi Claimants (Appellants' Brief at 19) that the United Bank holding applies only where the property sought to be confiscated is within the United States. Cf. Restatement of Foreign Relations § 43, Comment b and Illustration 2 (1965). It is perfectly clear that this Court in United Bank was applying the same standard that has been applied in connection with the act of state doctrine, i.e., that the confiscation is extraterritorial unless it can be completed within the territory of the confiscating state and that,

if it is not so completed, it is not shielded by the act of state doctrine and is subject to our public policy. As has been demonstrated in Point II, supra, the Bangladesh confiscation here was extraterritorial; therefore, the final objection made by the Bangladeshi Claimants to the decision below must be rejected.

Conclusion

For the foregoing reasons, the judgment below for Muslim Bank should be affirmed.

Dated: August 1, 1977

Respectfully submitted,

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUPALI BANK :
:
v. : CIVIL ACTION NO. 72-1653
:
PROVIDENT NATIONAL BANK :

MEMORANDUM AND ORDER

CAHN, J. September 22, 1975

Plaintiff, Rupali Bank ("Rupali"), a Bangladesh banking company, seeks to recover the sum of $648,294.94 from defendant, Provident National Bank ("Provident"). The principal office of the Muslim Commercial Bank, Ltd., ("Muslim Bank") in Karachi, West Pakistan, made arrangements with Provident to collect and deposit in a dollar account the proceeds from certain export transactions. Rupali contends that the deposits with Provident were claimed by the Muslim Bank's branch at Motijheel, Dacca, East Pakistan ("Motijheel Branch") and that the Bangladesh Banks Nationalisation Order, dated March 26, 1972, (the "Nationalisation Order") effectively expropriated those funds for the benefit of Rupali.

The case has been tried without a jury and, after considering a stipulation of facts, the oral testimony and documentary evidence, I make the following FINDINGS OF FACT:

1. Since 1956, Muslim Bank had its head office, principal place of business, corporate domicile and registered office in Karachi, West Pakistan.

2. Muslim Bank opened the Motijheel Branch in East Pakistan on June 15, 1966.

3. The Muslim Bank is a business entity organized under the statutory law of Pakistan and is the holder of a certificate of incorporation dated July 9, 1947.

4. From June 15, 1966, to December 16, 1971, the Muslim Bank exercised control over its Motijheel Branch including the approval of extension of credit in cases where the loans exceeded $1,000 unsecured and $2,500 secured.

5. The Muslim Bank required the Motijheel Branch to submit weekly statements pertaining to assets and liabilities but these statements contained no entries for net worth.

6. The Motijheel Branch, prior to December 16, 1971 did not hold any separate charter or article of incorporation and was not a separate legal entity.

7. In early 1967, Muslim Bank's principal office in Karachi arranged with Provident to open a dollar account with Provident for the collection of export bills for jute drawn on Wilcox Industries, Inc., ("Wilcox") an importer located in the United States.

8. This dollar account was known and designated as "The Muslim Commercial Bank, Ltd., Adamjee House, McLeon Road, Karachi, Pakistan" account.

9. Muslim Bank directed Provident to credit the proceeds of export bills to that account.

10. Adamjee Jute Mills, Ltd., ("Adamjee") operated a jute processing mill in East Pakistan which has now become a separate nation known as Bangladesh.

11. During the period of July 18, to October 27, 1971, Adamjee forwarded 56 shipments of jute from the territory of East Pakistan to Wilcox.

12. For each shipment of jute, Adamjee financed the export transaction by borrowing from Muslim Bank the sum that would ultimately be collected from Wilcox, with delivery to the Muslim Bank of a documentary draft, including an ocean bill of lading, drawn upon Wilcox and payable to the order of the Muslim Bank.

13. These loans from the Muslim Bank to Adamjee were to be repaid by the proceeds from the export bills which were deposited to the account at Provident.

14. Adamjee delivered the export bills to Muslim Bank's Motijheel Branch which forwarded them to Provident for collection with the following instructions:

> "On realisation kindly credit the proceeds to our Head Office, Karachi account with you under advice to them and to us."

15. On or before November 24, 1971, Provident presented the export bills to Wilcox for acceptance.

16. Before December 1, 1971, all of the bills had been accepted by Wilcox and all the shipments of jute related to said bills had been delivered to United States ports.

17. The export bills were collected by Provident from Wilcox between December 1, 1971, and March 22, 1972, and the net proceeds of $648,294.94 were credited by Provident to the Muslim Bank's account.

18. Commencing in March, 1971, revolutionary foment existed in Bangladesh culminating in the fall of Dacca to Bangladesh forces on December 16, 1971.

19. Following December 16, 1971, the Bangladesh government appointed an administrator of the assets for those banks whose head offices were located in East Pakistan.

20. The Bangladesh Banks Nationalisation Order, which became effective March 26, 1972, purported to vest all assets of the Motijheel Branch in the plaintiff, Rupali.

21. All collections on the export bills were made by Provident prior to March 26, 1972, the date of the Nationalisation Order.

22. On or about January 10, 1972, Rupali issued instructions to Provident to dispose of the dollar account, which instructions Provident did not follow.

23. Prior to March 26, 1972, Provident placed the funds in the dollar account in a suspense account and after March 26, 1972, paid said funds to Muslim Bank after receiving an indemnity and hold-harmless agreement.

DISCUSSION

An outline of Rupali's claim is necessary for an understanding of this matter. Rupali contends: the Motijheel Branch was and is an independent and separate entity; the assets of the Motijheel Branch have been expropriated under the Nationalisation Order which vests those assets in Rupali; it therefore has become the owner of the underlying debt of Adamjee which debt was owed to the Motijheel Branch; collections made by Provident were due to the Motijheel Branch as security for the underlying debt; the situs of the security for the underlying debt is in Bangladesh; the Nationalisation Order operates to confiscate the funds on deposit in Philadelphia because either the situs of the debt is the location of the creditor, or Provident is subject to the jurisdiction of the courts of Bangladesh under the facts of this case; this court is bound to apply the act of

state doctrine[1] to give effect to the Nationalisation Order's purported transfer of title to the funds collected by Provident by ordering their payment to Rupali; and in any event Provident was required to pay over the dollar account to the assignee of Rupali pursuant to the exercise of a power of attorney which is irrevocable.

I have found as a fact that the Motijheel Branch is not an independent entity and was a creature of the Muslim Bank. I have also found, and it is undisputed, that the dollar account was opened in the name of the Muslim Bank and designated as such on the records of Provident. The law of this forum[2] relies on a presumption that a deposit belongs to the person in whose name it is entered although such a presumption is rebuttable. Egbert v. Payne, 99 Pa. 239 (1882); Patterson v. Marine Bank, 130 Pa. 419 (1889), 9 C.J.S. Banks and Banking §285.

Plaintiff, upon which the burden of proof rests initially, has failed to establish that the Motijheel Branch had any separate or independent right to the dollar account held by Provident in Philadelphia, and in addition has failed to rebut

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[1]The classic statement of the act of state doctrine is found in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory..."

[2]Section 4-102(2) of the Uniform Commercial Code, 12A P.S. 4-102(2) requires application of Pennsylvania law in determining the rights of the parties. Furthermore, since the bank account was established in Pennsylvania and disbursement of the proceeds was to take place in Pennsylvania, the most significant contacts are related to Pennsylvania, and, therefore, the law of Pennsylvania applies. Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205 (3rd Cir.) cert. denied 400 U.S. 826 (1970).

the presumption that said account is owned by the person in whose name the account stands. The testimony that the collections by Provident would eventually be credited by the Karachi office to the Motijheel Branch in rupees, although uncontroverted, does not substantiate any independent right of ownership in that dollar account by the Motijheel Branch in the absence of any proof that the Motijheel Branch was separately organized under the statutory laws of Pakistan.

Although plaintiff's syllogistic argument is defective because it has not met the burden of proof in respect to the ownership of the account and the alleged independent existence of the Motijheel Branch, there are other fatal flaws with the plaintiff's case. The plaintiff relies on United States v. Belmont, 301 U.S. 324 (1937), and United States v. Pink, 315 U.S. 203 (1942), for the proposition that the situs of a debt is where the creditor is located and since the creditor was the Motijheel Branch, Bangladesh has jurisdiction to expropriate the debt in which event the act of state doctrine would preclude this court from reviewing whether the expropriation was violative of public policy. The Belmont and Pink cases must be restricted to the peculiar facts of those cases which involve the Litvinov Assignment.[3] In the absence of diplomatic arrangements, the cases of Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965) and Menendez v. Saks and Co., 485 F.2d 1355 (2d Cir. 1973) cert. granted sub. nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 416 U.S. 981 (1974), are dispositive of this issue. Since no provision has been made to compensate Muslim Bank for the expropriation of its assets, the following statement in

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[3] Applicable excerpts from the Litvinov Assignment are set forth in the Pink case, supra, at Pp. 212 and 213.

Republic of Iraq, supra, at page 51, becomes determinative:

> "Confiscation of the assets of a corporation has been said to be 'contrary to our public policy and shocking to our sense of justice,...'"

Since the dollar account was located in Philadelphia the act of state doctrine does not preclude this court from enforcing the public policy of the United States and the Commonwealth of Pennsylvania which is vehemently opposed to confiscation without compensation. Also, as noted above, there was no question in Belmont that a Russian corporation was the owner of the assets located in New York State. Here, I have found that the plaintiff was not the owner of the dollar account in Philadelphia.

Plaintiff further argues that dictum in Menendez requires this court to apply the act of state doctrine in favor of the plaintiff on the ground that Provident was subject to the jurisdiction of Bangladesh courts at the time of the expropriation. In Menendez, the court stated:

> "For purposes of the act of state doctrine, a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it ...
>
> "... In the absence of any showing that the [debtors] were present in Cuba or subject to the jurisdiction of Cuban courts at the time of the [nationalization] ... no legal effect should be accorded to Cuba's purported confiscation of the [debts]." 485 F.2d at 1364, 1365.

In order to take advantage of the foregoing language, the plaintiff has called an expert witness, learned in the law of Pakistan and Bangladesh, who gave his opinion that under section 20(c) of the Code of Civil Procedure of 1908 the Bangladesh court would have jurisdiction over Provident[4] because the cause of action

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[4]The laws of Pakistan were made applicable in Bangladesh following December 16, 1971, by Proclamation of the Bangladesh government.

partially arose in Bangladesh. In contravention of this opinion, the defendant called an expert learned in the law of Pakistan who testified that in his opinion no jurisdiction over Provident existed in the Bangladesh courts under the civil code referred to by plaintiff's expert. Both experts referred to case and statutory law and copies of same were introduced into evidence.

Paragraph 20(c) of the Code of Civil Procedure of 1908 provides as follows:

> "Other suits to be instituted where defendants reside or cause of action arises. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction: --
>
> "(c) the cause of action, wholly or in part, arises."

The concept of jurisdiction in Pakistan and Bangladesh is not dissimilar to American notions of jurisdiction. Actually, the law of Pakistan and Bangladesh is derived from the English common law. Plaintiff's expert could point to no specific case where in personam jurisdiction was exercised by a Pakistan or Bangladesh court over a foreign debtor where there were no other contacts between the debtor and Pakistan or Bangladesh, other than the debt itself.

Defendant's expert testified that there was a creditor-debtor relationship between Provident and Muslim Bank, that the relationship arose by acceptance of Provident in Philadelphia of the obligation to collect the export bills from Wilcox, that the debt was payable by Provident in Philadelphia, and that the cases referring to this question hold that the cause of action arises where the contract is made or broken or where performance is to take place. Since all of those contacts are Philadelphia,

defendant's expert concluded that no part of the cause of action arose in Bangladesh, and, therefore, the Bangladesh courts lack in personam jurisdiction over Provident.

After a careful review of the statutes and cases involved and considering the direct and cross-examinations of the experts, I conclude that the Bangladesh courts would not have in personam jurisdiction over Provident in regard to the dollar account in Philadelphia. Therefore, the dictum in Menendez does not require the application of the act of state doctrine to this case to enforce the expropriation order.

Plaintiff also contends that Muslim Bank issued a power of attorney to certain employees of the Motijheel Branch and that pursuant to this power Provident was notified to dispose of the dollar account for the benefit of Rupali. Although Provident may have had a right to rely on such an instruction in the absence of knowledge that it was revoked, since it did not, the question is moot. Plaintiff argues that the power of attorney was irrevocable because it was coupled with an interest in that the holders were entitled to some kind of compensation from Muslim Bank. Plaintiff never definitely established the exact nature of this interest but, in any event, the interest of an agent in compensation "... does not support a claim of a power coupled with an interest which will bar revocation of the agency or power." 3 Am Jur 2d Agency §64; McMahan v. Burns, 216 Pa. 448 (1907). The notice of termination of the agency relationship was received by Provident on or about December 31, 1971, which was prior to the instruction it received from Rupali on or about January 10, 1972. Also, under the law of Pakistan and Bangladesh an agent is not permitted to act contrary to the best interests of his

principal (defendant's legal expert testified that such is the law), and, therefore, plaintiff is estopped from claiming that Provident should have followed instructions it issued to dispose of the dollar account. The rule is the same in Pennsylvania. Kribbs v. Jackson, 387 Pa. 611 (1957).

I reach the following CONCLUSIONS OF LAW:

1. This court has subject matter jurisdiction pursuant to 28 U.S.C.A. §1332(a) and in personam jurisdiction over the parties.

2. Under the law of Pakistan and under the law of Bangladesh the Motijheel Branch was not an independent entity and it did not, as a branch, have separate title to any of the assets lodged with it.

3. The dollar account in Provident was owned by Muslim Bank and not the Motijheel Bran

4. The Nationalisation Order is ineffective to expropriate the dollar account held by Provident.

5. Under the law of Bangladesh, the courts of Bangladesh could not obtain in personam jurisdiction over Provident in this case in that no part of the within cause of action arose in Bangladesh, and there is no other basis for the imposition of in personam jurisdiction over Provident.

6 The Muslim Bank validly revoked the power of attorney it had previously issued to certain employees of the Motijheel Branch prior to the exercise of that power of attorney.

7. Judgment will be entered for the defendant.

Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUPALI BANK	:	
	:	
v.	:	CIVIL ACTION NO. 72-1653
	:	
PROVIDENT NATIONAL BANK	:	

O R D E R

AND NOW, this 22nd day of September, 1975, judgment is entered in favor of the defendant.

BY THE COURT:

Edward N. Cahn, J.